Public Prosecutor v Ahmad Syameer bin Ahmad Taufek

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–55–02 OF 2022
HANIPAH FARIKULLAH, HADHARIAH SYED ISMAIL AND HASHIM HAMZAH JJCA
19 OCTOBER 2023

Constitutional Law — Attorney General/public prosecutor — Power to institute, conduct or discontinue proceedings — Appellant appealed against acquittal and discharge of respondent but later withdrew appeal — Respondent's application to continue with hearing of appeal allowed by High Court — Whether Attorney General ('AG') cum public prosecutor ('PP') may discontinue appeal that was filed against accused's acquittal

Criminal Procedure — Appeal — Appeal against acquittal and discharge — Appellant appealed against acquittal and discharge of respondent but later withdrew appeal — Respondent's application to continue with hearing of appeal allowed by High Court — Whether High Court judge may decide to continue with hearing of appeal even though AG/PP had decided to discontinue appeal proceeding

The respondent was charged with an offence under s 411 of the Penal Code before the magistrate court. The respondent was acquitted and discharged at the end of the defence case. The appellant ('prosecution') filed an appeal against the said decision to the High Court. However, the prosecution later filed a notice of withdrawal of appeal. The respondent filed a notice of application to continue with the hearing of the appeal and the High Court allowed the respondent's application. Aggrieved, the prosecution filed this appeal. The issues for determination were: (a) whether in criminal appeals, the Attorney General ('AG') cum the public prosecutor ('PP') may discontinue the appeal that was filed against the accused's acquittal; and (b) whether in criminal appeals, the learned High Court judge ('HCJ') may decide to continue with the hearing of the appeal even though the AG/PP had decided to discontinue the appeal proceeding.

Held, allowing the appeal:

(1) The AG/PP had the power, control and direction of all criminal prosecutions and proceedings under the Criminal Procedure Code ('the CPC'), which was exercisable at his discretion. This would include, among others, the power to discontinue any proceedings for an offence. The powers conferred in the AG/PP in s 376(3) of the CPC were unfettered and could not be challenged or substituted by that of the

court. The courts could not compel the AG/PP to continue any criminal proceedings that the AG/PP had decided to discontinue. The AG/PP may, in exercising his power, discontinue the appeal that was filed against the accused person's acquittal (see paras 11, 13, 17 & 23).

(2) The HCJ had referred to ss 310, 313(2) and 316 of the CPC in holding that the High Court had the power and jurisdiction to continue with the appeal even when the AG/PP had decided to discontinue the proceeding. However, none of the provisions supported the proposition that the High Court may continue with the appeal even when the AG/PP had decided to discontinue with the proceeding. The HCJ erred when he relied on these provisions to continue with the appeal proceedings. In criminal appeals against acquittal, no provision in the CPC conferred any powers to the High Court to continue with the appeal in situations where the AG/PP had decided to discontinue the appeal proceeding. Hence, when the HCJ decided to allow the respondent's application to continue with the appeal even though the AG/PP had decided to discontinue the appeal proceeding by filing the notice of withdrawal of the appeal, the HCJ had infringed the constitutional powers of the AG/PP by deciding to continue with the appeal proceeding which the AG/PP did not wish to continue. There was no prejudice to the respondent as his acquittal before the magistrate court still stands, and he was protected under the double jeopardy rule against being charged for the same offence twice (see paras 31, 35 & 43–45).

[Bahasa Malaysia summary

Responden didakwa dengan kesalahan di bawah s 411 Kanun Keseksaan di hadapan mahkamah majistret. Responden telah dibebaskan dan dilepaskan pada akhir kes pembelaan. Perayu ('pihak pendakwaan') memfailkan rayuan terhadap keputusan tersebut ke Mahkamah Tinggi. Walau bagaimanapun, pihak pendakwaan kemudiannya memfailkan notis penarikan balik rayuan. Responden memfailkan notis permohonan untuk meneruskan pendengaran rayuan dan Mahkamah Tinggi membenarkan permohonan responden. Terkilan, pihak pendakwaan memfailkan rayuan ini. Isu-isu untuk penentuan adalah: (a) sama ada dalam rayuan jenayah, Peguam Negara ('PN') merangkap pendakwa raya ('PR') boleh menghentikan rayuan yang difailkan terhadap pembebasan tertuduh; dan (b) sama ada dalam rayuan jenayah, hakim Mahkamah Tinggi yang bijaksana ('HMT') boleh memutuskan untuk meneruskan pendengaran rayuan walaupun PN/PR telah memutuskan untuk menghentikan prosiding rayuan.

Diputuskan, membenarkan rayuan:

(1) PN/PR mempunyai kuasa, kawalan dan arahan semua pendakwaan dan prosiding jenayah di bawah Kanun Tatacara Jenayah ('KTJ'), yang boleh dilaksanakan mengikut budi bicaranya. Ini termasuk, antara lain, kuasa

untuk menghentikan sebarang prosiding bagi sesuatu kesalahan. Kuasa yang diberikan dalam PN/PR dalam s 376(3) KTJ tidak terikat dan tidak boleh dicabar atau digantikan dengan kuasa mahkamah. Mahkamah tidak boleh memaksa PN/PR untuk meneruskan sebarang prosiding jenayah yang telah diputuskan oleh PN/PR untuk dihentikan. PN/PR boleh, dalam melaksanakan kuasanya, menghentikan rayuan yang difailkan terhadap pembebasan orang yang dituduh (lihat perenggan 11, 13, 17 & 23).

(2) HMT telah merujuk kepada ss 310, 313(2) dan 316 KTJ dalam memutuskan bahawa Mahkamah Tinggi mempunyai kuasa dan bidang kuasa untuk meneruskan rayuan walaupun PN/PR telah memutuskan untuk menghentikan prosiding. Walau bagaimanapun, tiada satu pun peruntukan menyokong cadangan bahawa Mahkamah Tinggi boleh meneruskan rayuan itu walaupun apabila PN/PR telah memutuskan untuk menghentikan prosiding. HMT terkhilaf apabila bergantung kepada peruntukan tersebut untuk meneruskan prosiding rayuan. Dalam rayuan jenayah terhadap pembebasan, tiada peruntukan dalam KTJ memberikan sebarang kuasa kepada Mahkamah Tinggi untuk meneruskan rayuan dalam situasi di mana PN/PR telah memutuskan untuk menghentikan prosiding rayuan. Oleh itu, apabila HMT memutuskan untuk membenarkan permohonan responden meneruskan rayuan walaupun PN/PR telah memutuskan untuk menghentikan prosiding rayuan dengan memfailkan notis penarikan balik rayuan, HMT telah melanggar kuasa perlembagaan PN/PR dengan memutuskan untuk meneruskan prosiding rayuan yang PN/PR tidak mahu diteruskan. Tiada prejudis kepada responden kerana pembebasannya di hadapan mahkamah majistret masih kekal, dan dia dilindungi di bawah peraturan pendakwaan dua kali daripada didakwa atas kesalahan yang sama (lihat perenggan 31, 35 & 43–45).]

Cases referred to

Bird Dominic Jude v PP [2014] 3 MLJ 745; [2014] 4 CLJ 133, FC (refd)
Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66; [1977] 1 LNS 38, FC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544; [1991] 1 CLJ Rep 183, SC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152; [1974] 1 LNS 80, FC (refd)
Mohd Rafizi bin Ramli v PP [2014] 3 MLJ 114; [2014] 4 CLJ 1, CA (folld)
PP v Zainuddin & Anor [1986] 2 MLJ 100; [1986] CLJ Rep 232, SC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116; [1976] 1 LNS 180 (distd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681; [1997] 4 CLJ 740, HC (folld)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (distd)
Teh Cheng Poh v PP [1979] 1 MLJ 50; [1978] 1 LNS 202, PC (refd)

Legislation referred to

Criminal Procedure Code ss 310, 313, 313(2), 316, 376(1), (3), 418A
Federal Constitution art 145(3)
Penal Code s 411

Appeal from: Criminal Application No CA-44–10–11 of 2021 (High Court, Kuantan)

Mohd Dusuki bin Mokhtar (with Parvin Hameedah Natchiar) (Deputy Public Prosecutor, Attorney Generals' Chambers) for the appellant.
Asiah bt Abd Jalil (Asiah Abd Jalil) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] Briefly, the background facts leading to the present appeal are as follows.

[2] The respondent was charged with an offence under s 411 of the Penal Code before the magistrate court.

[3] On 1 February 2021, the respondent was acquitted and discharged at the end of the defence case. The prosecution filed an appeal against the said decision to the High Court on 8 February 2021.

[4] On 12 October 2021, when the appeal was set for hearing at the High Court, the prosecution did not file any written submission. The High Court fixed another date for the hearing. A day later, ie, on 13 October 2021, the prosecution filed a notice of withdrawal of appeal.

[5] Subsequently, on 1 November 2021, the respondent filed a notice of application to continue with the hearing of the appeal. On 28 February 2022, the High Court allowed the respondent's application.

[6] Aggrieved with the said decision, the prosecution filed this appeal before us.

ISSUES

[7] Based on the appeal records and the submissions by both parties, we are of the view that the core issues to be determined in the present appeal are as follows:

(a) whether in criminal appeals, the Attorney General ('AG') cum the public prosecutor ('PP') may discontinue the appeal that was filed against the accused's acquittal; and

(b) whether in criminal appeals, the learned High Court judge ('HCJ') may decide to continue with the hearing of the appeal even though the AG/PP had decided to discontinue the appeal proceeding.

OUR ANALYSIS AND FINDINGS

[8] With regard to the first issue, the learned deputy public prosecutors ('DPP') for the appellant began their submission by directing our attention to the powers of the AG/PP in the Federal Constitution ('the FC') and the Criminal Procedure Code ('the CPC').

[9] Firstly, art 145(3) of the FC states that:

> *The Attorney General shall have power, exercisable at his discretion,* to institute, conduct or *discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.* (Emphasis added.)

[10] Next, s 376(1) of the CPC stipulates that:

> The *Attorney General shall be the Public Prosecutor* and *shall have the control and direction of all criminal prosecutions and proceedings under this Code.* (Emphasis added.)

[11] In summary, it is clear under the law that the AG/PP has the power, control and direction of all criminal prosecutions and proceedings under the CPC, which is exercisable at his discretion. This would include, among others, the power to discontinue any proceedings for an offence.

[12] For completeness, these powers are also exercisable by a DPP appointed by the AG/PP. Section 376(3) of the CPC provides that:

> The Public Prosecutor may appoint fit and proper persons to be *Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors.*

[13] We agree with the learned DPP that the powers conferred in the AG/PP above are unfettered and cannot be challenged or substituted by that of the court. In *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 1 CLJ Rep 183, Abdul Hamid Omar LP (as he then was) speaking for the then Supreme Court held as follows:

> Perhaps it is appropriate that we now pause to consider the constitutional consequence of relying on the English Common Law concept. Unlike, UK, the Constitution of the Federation which is a written law is specifically declared to be supreme law of the land. Also, it is to be noted that UK has no criminal procedure code as enacted by our Legislature. For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. *The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the Court's. The reasoning and logic behind such contention is well illustrated in the cases of Public Prosecutor v Lee Tin Bau, Long bin Samat v Public Prosecutor* [1974] 2 MLJ 152, *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, *Poh Cho Ching v Public Prosecutor* [1982] 1 MLJ 86; [1981] CLJ Rep 229. In the circumstances it is superfluous to reiterate the same points. (Emphasis added.)

[14] In exercising his powers, the AG/PP is at liberty to decide as he thinks fit. In *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66; [1977] 1 LNS 38, the Federal Court through Suffian LP (as he then was) held:

> The language of this provision is very wide, for it includes *the word 'discretion' which means liberty of deciding as one thinks fit.* In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to art 8. Rather, in my view, the contrary: art 8 it is that must be read subject to art 145(3). (Emphasis added.)

[15] On a side note, even though the AG/PP is at liberty to exercise the powers conferred to him under the law as he thinks fit, the AG/PP is expected to exercise his powers honestly and professionally through proper and unbiased considerations. The Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; [1978] 1 LNS 202 stated:

> It was contended on behalf of the appellant that the exercise of this discretion by the Attorney General deprived the appellant of his right under art 8(1) of the Constitution to equality before the law. The clause reads:
>
> > (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> *Their Lordships agree with the Federal Court in rejecting this contention. Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney General of Malaysia by art 145(3) of the Constitution, viz:*
>
> > The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.

There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. *All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration,* if indeed the Attorney General was possessed of a discretion to choose between prosecuting the appellant for an offence against s 57(1) of the Internal Security Act 1964, or for an offence under the Arms Act, 1960, and the Firearms (Increased Penalties) Act 1971, there is no material on which to found an argument that in the instant case he exercised it unlawfully. But, in their Lordships' view, although he had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the appellant but not proceeded with), once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the Internal Security Act 1960.

[16] Similarly, Salleh Abas LP (as he then was), in delivering the judgment of the Supreme Court in *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100; [1986] CLJ Rep 232, had this to say:

The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review. If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission, though anomalously he is a member of it. *Members of the public expect that he exercises his power bona fide and professionally in that when he prefers a charge against an individual he does so because public interest demands that prosecution should be initiated and when he refrains from charging an individual or discontinues a prosecution already initiated he also acts upon the dictate of public interest.* (Emphasis added.)

[17] Coming back to the present appeal, we hold that the courts cannot compel the AG/PP to continue any criminal proceedings that the AG/PP has decided to discontinue. In the oft-quoted case of *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152; [1974] 1 LNS 80, the Federal Court, through Ibrahim J (as he then was), held as follows:

In our view, this clause from the supreme law clearly gives the Attorney General very

wide discretion over the control and direction of all criminal prosecutions. *Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the Courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.* (For the position in England, please see Viscount Dilhorne's speech at pp 32–3 in *Smedleys Ltd v Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts. (Emphasis added.)

[18] The rationale behind it is simple. We agree with what has been said by Gopal Sri Ram JCA (as he then was) in *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681; [1997] 4 CLJ 740 as follows:

The importance of the proposition formulated by the learned Lord President in these two cases is that, as a matter of public law, the exercise of discretion by the Attorney-General in the context of art 145(3) is put beyond judicial review. In other words, the exercise by the Attorney-General of his discretion, in one way or another, under art 145(3) cannot be questioned in the courts by way of certiorari, declaration or other judicial review proceedings.

I think that the proposition is not only good law hut good policy. For, were it otherwise, upon each occasion that the Attorney-General decides not to institute or to conduct or discontinue a particular criminal proceeding, he will be called upon to account to a court of law the reasons for his decision. It will then be the court and not the Attorney-General who will be exercising the power under art 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us. (Emphasis added.)

[19] We also agree with Mohamed Apandi AN JCA (as he then was) in *Mohd Rafizi bin Ramli v Public Prosecutor* [2014] 3 MLJ 114; [2014] 4 CLJ 1, where it was held that:

[16] In fact in *Humphry*'s case, Viscount Dilhorne did caution about the danger of the perception that a judge is being involved in the act of prosecution. At p 511 of the cited case, he wrote as follows:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. *The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.*

[20] The traditional view that the exercise of the AG/PP's powers under art 145(3) of the FC is not amenable to judicial review has been superseded by the Federal Court through its latest decision in *Sundra Rajoo a/l Nadarajah v*

Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199. We will address this issue in a later part of this judgment.

[21] The next question to be asked is whether the power of the AG/PP to discontinue a criminal proceeding extends to an appeal against acquittal.

[22] To answer this question, it is important to note that an appeal is a continuation of a trial. In an appeal against acquittal, the criminal proceeding against the accused person is continued. We refer to the case of *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745; [2014] 4 CLJ 133 in which Zulkefli Makinudin CJ (Malaya), speaking for the Federal Court, held as follows:

> [21] *Furthermore, in the present case, the prosecution has filed a notice of appeal against the acquittal decision of the High Court. On this point it is important to consider that an appeal is a continuation of a trial (See the case of Balasingham v Public Prosecutor* [1959] 1 LNS 8; [1959] 1 MLJ 193). *Consequently, the criminal proceedings against the appellant is continued.* This gives jurisdiction to the Court of Appeal to rehear the case and decide on the appellant's guilt or innocence in respect of the drug trafficking charge against him. It is our judgment that the power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal is necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against acquittal of a capital offence such as drug trafficking, the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court. (Emphasis added.)

[23] In a nutshell, we answer the first issue in the affirmative. Based on the above, we conclude that the AG/PP may, in exercising his power, discontinue the appeal that was filed against the accused's acquittal.

[24] In the present appeal, the prosecution had notified the High Court of their decision to discontinue the appeal proceeding through the notice of withdrawal of appeal dated 13 October 2021. However, the learned HCJ had decided to continue with the hearing of the appeal by allowing the respondent's application.

[25] This brings us to the second issue of whether, in criminal appeals, the learned HCJ may decide to continue hearing the appeal against acquittal even though the AG/PP had decided to discontinue the appeal proceeding.

[26] The learned counsel for the respondent submitted that the law allows the High Court to continue with the appeal proceeding regardless of whether

the AG/PP had decided to discontinue it. Therefore, since the High Court has the power to continue with the appeal proceeding, there was no infringement of the AG/PP's powers.

[27] The learned counsel for the respondent cited ss 310, 313(2) and 316 of the CPC in support of their contention. The provisions are set down below for ease of reference.

[28] Section 310 of the CPC states that:

> Section 310 Appeal specially allowed in certain cases.
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> A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.

[29] Section 313 of the CPC mentions that:

> Section 313 Procedure at hearing.
>
> (1) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.
>
> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit:
>
> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.

[30] Section 316 of the CPC reads:

> Section 316 Decision on appeal.
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence —
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order. A

[31] In his grounds of decision, we found that the learned HCJ had referred to these provisions in holding that the High Court has the power and jurisdiction to continue with the appeal even when the AG/PP had decided to discontinue the proceeding. However, we do not agree with the learned HCJ because, in our view, none of the provisions seem to support this proposition. B

[32] Section 310 of the CPC gives a High Court judge the discretion to dispense with the failure of any person desirous of appealing to comply with some requirements or formalities in the CPC so that substantial justice may be done. Some examples include applications for an extension of time to file a notice or petition of appeal or applications to amend a notice or petition of appeal. C

D

[33] Section 313 of the CPC merely stipulates the order for the parties to the appeal to be heard during the hearing of the appeal. When the appellant is not present to support his appeal, the HCJ may resort to s 313(2) of the CPC. In the present appeal, the learned DPP did appear and was present before the Court. Therefore, this provision is not relevant. E

[34] Section 316 of the CPC merely sets out the powers of the High Court when exercising its appellate jurisdiction.

F

[35] In short, we agree with the learned DPP that none of the provisions above support the proposition that the High Court may continue with the appeal even when the AG/PP has decided to discontinue the proceeding. Therefore, we further agree with the learned DPP that the learned HCJ did err when he relied on these provisions to continue with the appeal proceeding. G

[36] In addition to the above, the learned counsel for the respondent further submitted that the powers of the AG/PP under the FC and the CPC are not absolute and are subject to check and balance by the judiciary. The learned counsel for the respondent relied on the case of *Sundra Rajoo* and *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180. The learned HCJ also cited these two cases in allowing the respondent's application to continue with the appeal proceeding. H

[37] Given the decision in *Sundra Rajoo*, it was primarily held that the AG/PP does not have absolute or unfettered discretion under art 145(3) of the FC. Nevertheless, the Federal Court further held that in all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, his decisions are cloaked with the presumption of legality. An onerous burden I

lies on the challenging party to overcome the strong presumption of legality for the decision to be judicially reviewed by the courts. The Federal Court observed:

> [109] That said, we accept that at stake in all review cases is the notion that the courts must be cautious not to run awry of the fine dividing line of the doctrine of separation of powers. In this regard, *while theAG/PP's powers are reviewable, the AG/PP's discretion under art 145(3) of the FC, as a matter of policy, remains subject to a higher threshold of scrutiny …* (Emphasis added.)

[38] We are also convinced by the submission of the learned DPP that the facts in *Sundra Rajoo* can be distinguished from those in the present appeal.

[39] In *Sundra Rajoo*, a challenge was mounted on the decision of the AG/PP through a judicial review application. It was also held in *Sundra Rajoo* that only in appropriate, rare, and exceptional cases should the discretion of the AG/PP be amenable to judicial review.

[40] The appeal before us did not arise from a judicial review application, and the respondent did not even satisfy the stringent two-step threshold during the leave stage to challenge the AG/PP's exercise of his discretion under art 145(3) of the FC.

[41] In *Sundra Rajoo*, the following can be observed:

> [112] Article 145(3) of the FC *provides the AG/PP with a wide discretion to institute, conduct or discontinue any proceeding for a criminal offence. This wide discretion means the AG/PP has sole and exclusive discretion in that only he/she can exercise such power. However, the AG/PP does not have absolute or unfettered discretion under* art 145(3). As alluded to in the preceding discussion and following from it, it is ourjudgment that in appropriate, rare and exceptional cases, such discretion is amenable to judicial review.
>
> [113] In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.
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> [114] Based on the foregoing authorities, it can be surmised that any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage of any application for judicial review.
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> [115] Firstly, the burden of proof lies on the applicant *The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognised by the earlier judgments on this subject, including but not limited to*:
>
> (a) illegality;

(b) procedural impropriety (eg, breach of the rules of natural justice);

(c) irrationality (considering irrelevant considerations or ignoring relevant and material considerations); and

(d) mala fides.

[116] Once the above legal grounds or any of them are clearly set out, *the applicant will then have to adduce compelling and prima facie proof that the decision or omission of the AG/PP falls within those grounds or any one of them.* In other words, the courts are to presume, having regard to the doctrine of separation of powers, that all or any of the grounds were not made out unless the evidence singularly leads to the inevitable conclusion that they have been made. It is only after that threshold is crossed that the AG/PP bears the burden to justify his actions or inactions to the court. *Ramalingam* at paras 27 to 28 is instructive:

> 27. That the burden of proof lies on the offender in this regard is a wholly trite proposition that is reflected in s 103(1) of the Evidence Act, which states that '[whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. In constitutional challenges to the prosecutorial discretion based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution, it is only when enough evidence is adduced to show a prima facie breach that the evidential burden will be shifted to the Attorney-General to justify his prosecutorial decision.
>
> 28. However, once the offender shows, on the evidence before the court, that there is a prima facie breach of a fundamental liberty (ie, that the Prosecution has a case to answer), the Prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At that stage, the Prosecution will not be able to rely on its discretion under art 35(8) of the Constitution, without more, as a justification for its prosecutorial decision.

[117] Needless to say, the assessment of the law and the facts will depend on the unique circumstances of each and every case. We state again at the risk of repetition that the assessment in each and every case must be made having regard to the doctrine of separation of powers. (Emphasis added.)

[42] With regard to the case of *Datuk Harun bin Haji Idris*, we also agree with the learned DPP that the facts in that case, can be distinguished from those in the present appeal because, in that case, the issue was on the constitutionality of s 418A of the CPC which is not relevant to the present appeal.

[43] In a nutshell, we answer the second issue in the negative. In criminal appeals against acquittal, no provision in the CPC confers any powers to the High Court to continue with the appeal in situations where the AG/PP had decided to discontinue the appeal proceeding.

[44] Hence, when the learned HCJ decided to allow the respondent's application to continue with the appeal even though the AG/PP had decided to discontinue the appeal proceeding by filing the notice of withdrawal of the appeal, the learned HCJ had infringed the constitutional powers of the AG/PP by deciding to continue with the appeal proceeding which the AG/PP does not wish to continue.

[45] There is no prejudice to the respondent as his acquittal before the magistrate court still stands, and he is protected under the double jeopardy rule against being charged for the same offence twice.

CONCLUSION

In conclusion, based on the above, we found merits in the appellant's appeal.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh